No. 15593

United States

COURT OF APPEALS

for the Ninth Circuit

CARPENTERS UNION, LOCAL 131; CARPENTERS UNION, LOCAL 1289; SEATTLE DISTRICT COUNCIL OF CARPENTERS, affiliated with THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; TEAMSTERS, CHAUFFEURS AND HELPERS, LOCAL UNION NO. 174, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302, AFL-CIO; and LOCAL 404, INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA, AFL-CIO,

Appellants,

vs.

CISCO CONSTRUCTION CO., an Oregon corporation,

Appellee.

APPELLEE'S BRIEF

Appeal from the United States District Court for the Western District of Washington, Northern Division.

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Appeal from the United States District Court for the Western District of Washington, Northern Division.

STATEMENT OF THE CASE
THE FACTS

The Trial Court narrowed the issues in this action substantially in its oral decision as follows:

> "* * * This case is of importance beyond its intrinsic self. It is extremely important to the plaintiff and it is also important to the defendants far and beyond the immediate case itself, and for that reason I want to be particularly careful in deciding it."

And the Court closed its oral decision as follows:

> "Therefore, I want the plaintiff to give me a memorandum pointing out what direct evidence there is in the record of actions by the defendants amounting to encouragement, inducement, procurement, by concerted action that looked toward termination of the subcontracts, and then point out what plaintiff suggests are the reasonable inferences that might be drawn from the direct evidence, and, lastly, in the memorandum I want the plaintiff to suggest what the evidence warrants in the way of a damage award for the first item of damage only; namely, what does the evidence show the damage was with respect to increased cost of performance flowing from and caused by termination of the subcontracts."

Thus there are posed three issues, namely: (1) the acts and conduct of the defendants which constituted a secondary boycott under the provisions of the Act; (2) the consequences of their acts and conduct so far as performance of subcontracts by the subcontractors was concerned; and (3) the increased cost of performance flowing from and caused by the termination or default of the subcontractors.

1. *Unlawful acts and conduct of the defendants.*

At stated in appellants' brief (pages 4, 5 and 6), Cisco Construction Co. had been awarded contracts for the construction of two Nike sites in the vicinity of Seattle, Washington. These contracts were for the

United States Army Corps of Engineers. They will be referred to herein as the "Young's Lake" site and the "Redmond" site. Cisco's successful bid on the Young's Lake job was $354,000.00, and on the Redmond job was $409,000.00.

Approximately 75% of the work on these jobs was subcontracted by Cisco to some 16 subcontractors.

It would perhaps be helpful to set forth at this point the dramatis personae of the ensuing action out of which this cause arose:

Clifford T. Schiel, President of Cisco Construction Co. (R. 81);

Andrew B. Cronkrite, Vice President of Cisco Construction Co. (R. 275-292);

Harry L. Carr, Business Representative, District Council of Carpenters; also, we believe, a member of Seattle Carpenters Local Union 131 (R. 267-274);

Russell T. Conlon, Secretary and Assistant Business Representative, Local 302, Operating Engineers (R. 468-478);

Cole (Jiggs) Abbott, Assistant Representative, Local 302, Operating Engineers (R. 190);

Jack McDonald, Business Manager, Local 302, Operating Engineers (R. 202);

J. Vincent Sauro, Secretary-Treasurer, Local 404, Laborers (R. 479-482);

Allan Crowder, Business Representative, Joint Council 28. Teamsters (R. 202);

Mr. Albert, Local 302, Operating Engineers (R. 227);

Ed Lucero, Local 404, Assistant Business Agent (R. 222);

James Harrison, Business Agent, Local 174, Teamsters (R. 465-468);

Robert Buchanan, Business Representative, Western Washington District Council of International Hod Carriers and Common Laborers of America, (R. 92), (not a defendant here).

All of the subcontractors with the exception of Schultz Electric Co. were so-called "Union Contractors." Cisco Construction Co. had no agreement with any of the defendant Unions and none of them had been certified as the bargaining representative of Cisco's employees.

Cisco hired a number of carpenters and laborers including a substantial number of members of the Unions.

Cisco's first contact with any of the appellants was through a visit from Mr. Carr, representative of the appellant Carpenters' Unions and apparently the chief architect and director of the subsequent campaign against Cisco. He was accompanied by a Mr. Robert Buchanan, who does not appear later in the proceedings (R. 92). These first early transactions are in dispute but would appear to be immaterial in view of the limitation of the issues dictated by the trial court. The undisputed fact remains that the appellants, at least the Carpenters, not only placed picket lines at both job sites, but also established a roving picket line on all of Cisco's material

trucks. This picketing continued until the jobs were completed (R. 101). The picketing was not peaceful in nature but coercive for these reasons: First, opprobrious language was used by the pickets (R. 99); an abnormally large number of pickets was placed on the job sites by the defendant carpenters' union supported without placards or banners by participants from all other defendant unions at inception of the picket line (R. 96). They were further buttressed by the coercive presence of union agents from other construction unions (R. 99); and attempts were made to block ingress and egress into the job site by undue force (R. 100).

The picket lines were established on November 5, 1954. On the same day that the picket line had been established, Mr. Carr contacted Frederick Franklin Forcier (a Cadman employee but not a carpenter) and advised him of the pickets in such a way that Forcier was prompted to leave his job and come down to phone his own Union (R. 157). Forcier later talked to Mr. Conlon, of his own Union, who advised him that he could 'tell them to go to the devil if he wanted to." Forcier made the following admission:

> "Q. You got the impression from the conversation, though, that the Union didn't want you to load the Cisco trucks?"
>
> A. Yes, sir" (R. 158).

Later Mr. Crowder (Teamster) called him and suggested that he was "getting pretty tired and should quit for the day;" that they were making tape recordings of his conversation (R. 158). Crowder further brought up the matter of honoring a picket line, to

which Forcier reacted by saying that he agreed that he was getting pretty tired and would go home. Crowder also made a veiled threat that Forcier's withdrawal card from the Teamsters "could be taken away from me" (R. 160). Forcier left the job that evening and did not return to his employment for two weeks (R. 161).

Robert A. Dickinson, an employee of Cadman, heard about the picket line before it was established or seen (R. 179). After the line had been established, he called his Union and Mr. Harrison and another Union representative came out to Cadman's, where they held a meeting with five or six employees, some engineers and some teamsters (R. 179). They had some discussion about the situation because Mr. Dickinson was afraid if they loaded Cisco's trucks the plant itself would be picketed and "stop the whole plant from loading everybody" (R. 181).

Witness Leonard P. Downs (a Cadman employee) testified that Abbott (Engineers) asked him to "come down" when the pickets arrived; that, he said, Abbott was around several times during the controversy although he had never been around Cadman's before the dispute or after (R. 187). Downs attended a noon meeting in the Cadman shop and identified Harrison's companion as Mr. Conlon (Engineers). Conlon at that time told the boys, "We are having a tough time making Cisco conform to the Union" (R. 188).

In addition to witness Downs, Mr. Abbott (Engineers) contacted witnesses Henry Cotterill and Roland

Pearson. With all three of these men he discussed the picket line and requested them to come down across the road when the pickets showed (R. 192-195). Abbott was active around the Cadman plant during the picketing.

Witness Tor W. Magnussen (President of Cadman) confirmed the existence and operation of the picket line around his plant and the activities of Conlon, Carr and Abbott, and, on later occasions, Mr. McDonald and Mr. Crowder. He confirmed also the impression that his employees had secured from their Union representatives that they were not to load Cisco trucks (R. 201).

He further testified Mr. Crowder (Teamsters) advised him that the Operating Engineers were coming out to his plant the next day, "and tell him (Forcier) not to operate" (R. 201). Mr. Magnussen also overheard the conversation on the telephone between his employee, Forcier, and Mr. Crowder, the latter saying, among other things, "Well, he said he was not threatening him, and that they were making a recording of it and were going to turn it over to the Engineers, making a recording of the telephone conversation" (R. 202). He also testified as to the procession of Union cars which followed Cisco trucks and vehicles and which are euphoniously referred to by appellants as a roving picket line (R. 203). Mr. Magnussen also overheard the intercom conversation between Harrison and Crowder and some of his men during the noon hour, at which the Cisco trouble was discussed (R. 204). The picketing continued to the end of the job (R. 205).

James Thurman (a fork-lift operator for Layrite and a member of 440) testified that Ed Lucero came to the Layrite plant and told him about the Cisco trouble (R. 214). He said something "about not loading Cisco trucks." He admitted that at the Labor Board hearing he testified that he responded "I said, O.K., that I would not load any trucks going to Cisco." Lucero assured him that if he were fired for refusing to load Cisco trucks, that "the Union would handle the situation, and if the Union couldn't handle the situation, he would call the Teamsters" (R. 215), and that the Teamsters would call a strike and shut down the plant (R. 216). Lucero made repeated visits to the plant and advised employees that they would be taken before the board of inquiry in the Union for disciplinary action if they continued to load Cisco trucks (R. 217). It was on November 29th that Lucero gave his instructions of not loading the trucks (R. 218), and it was not until December 7th that he countermanded these instructions (R. 219).

William Quinnett (also a Layrite employee and member of 440) testified that Ed Lucero had asked him also not to load Cisco trucks; that he was there on several occasions, sometimes with representatives of Local 302 (Engineers). He was also threatened with disciplinary action if he did not follow instructions (R. 223). Layrite kept its plant going by threatening to fire the employees if they refused to load Cisco trucks (R. 224).

Mr. Vernon Frese (president of Layrite) talked with representatives of the Operating Engineers and the Team-

sters, who had contacted his employees a few days prior to that time (R. 227). He was urged not to perform his contract with Cisco, and he was threatened with a picket line and with a disciplinary action against his men if he refused to comply with the Union demands to stop delivering material to Cisco (R. 228). Union representatives were in and around the plant for several days. Cars containing Union representatives were parked adjacent to the plant up to December 6th (R. 231). A good deal of psychological pressure was exerted against Mr. Frese and his employees up until December 8th (R. 232) because he knew "that there are lot of things the Union organizations can do to make it difficult" (R. 238). Tempers flared and conversations became heated between Mr. Frese and the Union representatives (R. 237).

Willie F. Neumann was a painting contractor who had a subcontract with Cisco. Although he had started on the work, he was unable to go forward with his contract (R. 242). He was called to a meeting and was ordered to appear before the Labor Council (R. 242) which was attended by a number of Union representatives. Mr. Neumann remonstrated that he had a contract with Cisco, but "they told us we would have to break that contract, and I say we cannot break the contract" (R. 243). Further, "they just told us we can't go ahead with this job, and then I tried to tell them that we would like to subcontract it to non-union painter contractor, and they said 'no' " (R. 243).

Mr. Anderson, of Soule Steel Company, had a similar experience. He testified that one Union representative

made this thinly-veiled threat: "What would happen if there was a picket line around your plant? (R. 263). His company was unable to perform after about 10% of the reinforcing steel called for by the contract had been installed (R. 262). "The contract was not performed from then on" and Cisco had to pick up the steel and install it with what help it could get (R. 263).

Mr. Bittner, manager of another subcontractor, testified that his employees felt they should not go on the job "for fear they might be criticized by their Union and perhaps threatened with a fine of some sort" (R. 255).

Witness Del E. Peeler testified that two Union representatives, one from the Teamsters and one from the Operating Engineers, came to his plant. "They went into the shop after they talked to me. * * * They talked to one or two of the men in there" (R. 257). They made "strong suggestions" that Cisco be made to load its own trucks (R. 259). Witness Luther Williams Camp recalled the same incidents testified to by Mr. Peeler (R. 260). He was concerned about the Union representatives interfering with the employees. He further testified: "I was concerned about these men going into my shop because naturally there is equipment running, and we don't like to have anyone going in our shop without permission, and I was upset that they came in and interfered with our work" (R. 261).

All of these transactions are confirmed by testimony of the defendants' own witnesses and representatives. James Harrison, (Teamsters) testified that although he

had never been out to Cadman's before or since, he did go out on the occasion of the noon meeting with employees. He went out with Russ Conlon of the Engineers and advised the men concerning the Cisco picket line (R. 466-468).

Russell T. Conlon (second in command of the Engineers) visited the Cadman plant where they had five members employed and discussed the Cisco situation with them (R. 469). Mr. Jiggs Abbott also of the Engineers had authority to pull those five members off the job (R. 470). He confirmed his participation in the meeting at the Cadman plant with a group of employees with Mr. Harrison (R. 472). This activity was carried on by Mr. Conlon regardless of the fact that "we did not have any labor trouble with Cisco and our local Union had no trouble with Cisco" (R. 474-475). Mr. Conlon also attended the meeting of the Seattle Labor Council on November 20th, when several of the Cisco subcontractors were called in (R. 477). Although the subcontractors requested permission to go back to work, such permission was not given (R. 478).

James V. Sauro "the principal officer of the Union" (R. 489) (Laborers Union) had several members working at Layrite Company and knew about the Cisco trouble and the contacts that had been made with Layrite's employees by the Union's Mr. Lucero (R. 483).

Finally, there is the testimony of Andrew B. Cronkrite, vice-president of Cisco. When he arrived on the job to take over superintendence, the work was about 15% completed and there were no subcontractors except one

working on the job (R. 277). Even at that time "we were doing certain work for the subcontractors. We were doing excavation. We were doing the plumbing, and we were doing the steel work—painting—a portion of it at that time" (R. 278). Although he contacted the subcontractors in an effort to get them to resume work on the job, they refused (R. 278). The performance of subcontractors' work required the procurement of specialized equipment, sometimes necessitating long trips to secure the same (R. 280). It involved delay and expense with reference to the procurment of materials (R. 281). Cisco had to supply all its man-power itself, which normally the subcontracors would handle including payroll and procurement (R. 281). Equipment hired and used by Cisco was subject to sabotage and vandalism (R. 285). Mr. Cronkrite attended the conference in Mr. Bassett's office, at which an effort was made to arrange a truce that would enable the subcontractors to put their men back to work and complete the job, but this conference proved unavailing (R. 287). None of the subcontractors (except the one open shop sub) ever resumed work and performed their subcontracts.

Because the defendant Unions, working together, by the preceding actions induced and encouraged the employes of the plaintiff's sixteen subcontractors to refuse to perform any service for the Cisco Construction Co., all of the plaintiff's subcontracts were terminated. The performance of these contracts was required for the fulfillment of the plaintiff's contract at both Youngs Lake and Redmond. The picket line of Carpenters' Union

Local 131, plus the threats made against the employees by the other defendants prevented the plaintiff from obtaining power equipment such as bulldozers, caterpillars, dragline shovels in late models and in good condition. The plaintiff was obliged to rent, at an exceedingly high cost, old equipment which was worn out (R. 110). Trucking equipment available to the plaintiff for use on the job sites was not of the same type or capacity as that owned and operated by plaintiff subcontractors (R. 108). This condition not only extended the time necessary for the completion of the contract, but made the operation clumsy.

After the picketing had commenced, all of the employees of the subcontractors left the job or refused to report for work (R. 127-128), with the exception of Schultz, the electrical contractor. All subcontractors refused to endeavor to deliver materials at the job site as their contract required. This forced the plaintiff to hire additional men to pick up materials to be delivered to the job (R. 112-113), and to find help to handle necessary emergencies on the job. Delays were also occasioned by the inexperience of the only personnel available for the on-job work. Plaintiff was required to advertise extensively by radio and newspaper to secure the necessary manpower to continue with the project (R. 282).

At Youngs Lake the Cisco Construction Co. was unable to secure the Puget Sound Power and Light Company to install the necessary lead-in wires to furnish power, or to secure the telephone company to install telephones (R. 283-284). This necessitated additional

expense of installing electrical generators and automobile telephones.

Plaintiff's president, Mr. Cliff Schiel, stated that the Redmond job required an additional 120 days to complete because of labor strife (R. 111), and that the Youngs Lake job required an additional 90 days to complete (R. 114).

Plaintiff's accepted bid upon the Youngs Lake contract was $354,000.00, and on the Redmond contract $409,000.00 (R. 87-88). The minimum profit on the total job cost was 10% (R. 85). On the 1st day of February, 1955, it became apparent that plaintiff could not complete the project, as all capital and credit of the corporation had been depleted, as well as that of the individual corporate owners. The United States Fidelity and Guarantee Company took an assignment of the contracts requiring plaintiff to complete construction (R. 115-116). At the time of the assignment plaintiff owed $150,000.00 on the two jobs (R. 171).

Plaintiff's minimum loss by reason of its failure to complete the contracts, was over $75,000.00. This was that which the court held was "at least" plaintiff's damages (R. 58).

The foregoing testimony, all of which is not only uncontradicted but completely and thoroughly upheld by witnesses for both plaintiff and defendants, would seem to be unassailable. The illegal conduct of the defendants resulted in monetary damage to the plaintiff of at least the amount found by the trial court.

ARGUMENT IN SUPPORT OF TRIAL COURT'S ORAL OPINION

SUMMARY OF APPELLEE'S POSITION

All defendant unions, by threatening action and language, created a concerted refusal of plaintiff's subcontractors' employees to do business with or render services for the plaintiff. This resulted in default of all plaintiff's subcontracts with resulting additional cost to the plaintiff.

ARGUMENT

In finding against the defendant unions in the case at bar, the trial court was fully aware of the rights of the defendant Carpenters' Union, Local 131, to engage in an economic strike by the maintenance of a picket line on job sites of the plaintiff as a lawful weapon. The court said:

> "At the conclusion of the trial it was held that the initial job site picketing by the carpenters with the type of signs they used was legal. Such finding is now confirmed." (R. 56).

The court in making such a statement in its memorandum recognized the defendant Carpenters' Union's right to strike (29 U.S.C. 163). The trial court further recognized the legal right of the union to maintain a "roving" picket line, although harm may be inflicted upon neutral employers which is incidental to the primary right to strike. *National Labor Relations Board v. Service Trade Chauffeurs, Salesmen and Helpers, Local 145, et al,* 191 F.(2d) 65 (2 Cir. 1951).

The trial court, however, did say that under the evidence:

> " * * * it is indisputable that each and all of the defendants engaged in activities amounting to secondary boycott prohibited by the Taft-Hartley Act as interpreted by the courts * * *" (R. 56).

The activities constituting secondary boycott as found by the court, are the following undisputed facts:

1. The picket line was situated "out in the country" where it could not communicate the facts of a labor dispute to anyone except the union employees of plain-plaintiff's subcontractors and their employees (R. 14, 86).

2. The picket line actually turned back only one union man—the first truck driver from Cadman's (R. 179).

3. None of the defendants, except the Carpenters Council, engaged directly in the primary banner picketing. All of the activities of the other defendants were undeniably for the purpose of making the picket line effective by exerting pressure and intimidation upon the plaintiff's subcontractors and their employees (R. 14).

4. No union had any dispute with any of the subcontractors (R. 16).

5. Representatives of all of the defendant unions were working together, usually two or more representatives from two or more unions. By ganging up, they made their pressure tactics more effective (R. 103, 209, 301).

6. Regardless of the remoteness of the picket line, the dispute was known "all over the area" immediately, and subcontractors' employees refused even to approach the job site (R. 103-106, 298-311, 156-161, 226-241, 256-258).

7. Every union subcontractor, except one open shop subcontractor, defaulted on his contract (R. 278, 243).

Signal Picket Line

Although Section 303a of the Labor-Management Act of 1947 as amended protects the union's right to strike, it specifically proscribes secondary boycotts, making it unlawful for one or more labor organizations to encourage workmen to concertedly refuse in the course of their job to perform any services if this refusal will force or require their employer to cease doing business with another person. The Federal Courts have recognized that in order to sustain the burden of proof in establishing a damage action arising out of a secondary boycott it is not necessary to produce direct evidence that the union induced and encouraged the employees in the manner proscribed by the act. Evidence of all of the circumstances surrounding a so-called "labor dispute" may be taken into consideration. The offending union will be charged with responsibility of a secondary boycott for the natural and reasonable consequences of their acts.

In *Getreu v. Brotherhood of Painters, Decorators and Paperhangers, Local Union No. 193,* 24 L.C. 67,906 (D.C. Northern District of Georgia, 1953), the court held illegal, picketing done intentially to cause a secondary boycott.

In the case of *Piezonki v. NLRB,* 219 F.(2d) 879, 27 L.C. 69,019, a trades council in the Baltimore area representing labor unions in the construction field placed a picket line about a non-union prime contractor's job site. Thereafter all subcontractors ceased work upon the job, contending their employees refused to cross the picket line. The subcontractor's employees sought advice from their unions as to whether they might cross the picket line, but received no answer.

The Board refused relief, but the Fourth Circuit Court of Appeals remanded the cause to the Board for relief against the union for such conduct. The court said:

> "Where the Act speaks of the object of picketing it refers of course, to the intent, but this intent is legal intent, and not necessarily what is in the mind of the actor. Everyone is considered to intend the reasonable and natural consequences of his acts.
>
> "It is no answer to this to say that the campaign was an organizational campaign and that picket signs so indicated. The picketing was done at the premises where the business of the subcontractors as well as the business of the contractors is being carried on; and every one knew that it would affect, not the non-union employees of the general contractors, but the union employees of the subcontractors, and it is idle to suggest that it was not engaged in for this purpose. As the object was to bring pressure on the general contractors by the pressure exerted on the subcontractors, through concerted action of their employees, we think that the conduct complained of is clearly an unfair labor practice within the meaning of Section 8 (b) (4) (A) * * * "*

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* (Sections 8(b)(4)(A) and 303 A-1 of the Act are in identical language in defining a secondary boycott.)

In the first case decided on that day, *National Labor Relations Board v. Denver Building & Construction Trades Council,* 341 U.S. 675, 19 L.C. 66,347, a picket line was established around a job site of the prime contractor to prevent the performance of electrical work by non-union employees. The Denver Building & Construction Trades Council requested that the prime contractor discharge the offending non-union subcontractor. When a picket line was established all work was suspended. The court, after tracing the legislative history of the provision of the Act proscribing secondary boycotts, held the picket line to be a "signal picket" line creating a secondary boycott and in so doing stated:

> " * * * That an objection, if not the only object, of what transpired with respect to * * * Doose and Lintner was to force and require them to cease doing business with Gould & Pieisner seems scarcely open to question, in view of all the facts. And it is clear at least as to Doose and Lintner that that purpose was achieved.
>
> " * * * It is not necessary to find that the sole object of the strike was that of forcing the contractor to terminate the subcontractor's contract. This is emphasized in the legislative history of the section. * * * That an object, if not the only object,

In the second case, IBEW Local 501, AFL v. NLRB, (341 U.S. 694) (19 L.C. 66, 348), construction picketing was carried on where a prime contractor refused to bar a non-union subcontractor from the job at the union's request. It was here argued that the *Denver Case,* supra, was not in point as there was no "signal" picket line, as only one union was responsible for the line. The court found that one union could "induce and encourage"

employees of another employer to cease doing business with another person:

> "To exempt peaceful picketing from the condemnaton of 8 (b) (4) (A) as a means of bringing about a secondary boycott is contrary to the language and purpose of that section. The words "induce and encourage" are broad enough to include in them every form of influence and persuasion."

Again that day construction picketing was enjoined by a cease and desist order in the case of *Local 74, United Brotherhood of Carpenters, AFL v. NLRB,* 341 U.S. 707, 19 L.C. 66,349, where a subcontractor endeavored to employ a non-union workman to install and lay carpeting. In this case no picket line was maintained about the job site, the carpenters simply removed their men. The National Labor Relations Board issued a cease and desist order to the Carpenters Union. The Supreme Court affirmed the action:

> "The statute did not require the individual carpenters to remain on this job. It did, however, make it an unfair labor practice for the union or its agent to engage in a strike, as they did here, when an object of doing so was to force the project owner to cancel his installation contract with Watson's."

National Labor Relations Board Held These Facts to Constitute Secondary Boycott

Great weight is accorded to the construction of the terms of the Labor-Managemet Relations Act of 1944, and the finding of the Board with respect to questions of fact. The Supreme Court of the United States ruled in *NLRB v. Denver Building & Construction Trade Council,* 341 U.S. 675, 19 L.C. 66, 347, said:

> "Not only are the findings of the board conclusive with respect to questions of fact in this field when supported by substantial evidence on the record as a whole, but the board's interpretation of the act and the board's application of it in doubtful situations are entitled to weight."

The plaintiff herein filed charges against the above named defendants before the regional office of the National Labor Relations Board in Seattle, Washington, and in pursuance of such charge a complaint was duly issued. After a hearing involving the same facts established by the same witnesses as in this case, the Trial Examiner of the NLRB issued an intermediate report in Seattle District Council of Carpenters (19 CC 72, 114 NLRB 12). It was these findings in which one of appellee's counsel, Samuel Bassett, accepted in open court the statement "The Board certainly investigated this case." (R. 34).

The trial examiner said:

> "The credible evidence clearly discloses that Respondent's picketing and other conduct at Cadman, Western, and Layrite as summarized above, were not 'merely incidental' to the picketing at Cisco, but, at least in part, specifically aimed at Cadman, Layrite, and Western and their respective employees and hence it is found that Respondents' aforementioned conduct and activities were not protected primary picketing under the criteria established by the Board in the *Sailors' Union Case*. Accordingly, the Trial Examiner finds that respondents, and each of them, engaged in conduct violative of Section 8(b) (4) (A) of the Act."

The National Labor Relations Board affirmed the Trial Examiner as follows:

> "These facts and the record as whole make it plain that the operation of Cisco at Redman and Youngs Lake on a non-union basis were a matter of concern to all the respondents and that respondent carpenters' activity against Cisco and the action taken by the other respondents, whose manifest purpose was to implement and further the effectiveness of respondents carpenters' activity, were all directed toward the same end, namely, to secure the unionization of Cisco employees. In this matter, we find, the respondents were not acting as strangers to one another, but rather were engaged in a joint course of action to accomplish their common purpose. Under well established principles, this joint venture relationship between the respondents carried with it responsibility by the respondents for each others acts."

This court, on October 25, 1955, in the case of *International Longshoremen's & Warehousemen's Union v. Hawaiian Pineapple Company,* 226 F.(2d) 875, 29 L.C. 69,525, affirmed a jury judgment in the amount of $201,274.27 against the International Longshoremen & Warehousemen's Union for conduct of the union in inciting a riot behind a picket line for the sole purpose of preventing the unloading of a cargo of pineapple at a public dock at The Dalles, Oregon, in order to gain a victory over different employers involved with the defendant union in strikes and picketing in the territory of Hawaii. The Circuit Court of Appeals in affirming the District Court's judgment stated:

> "The issues properly went to the jury on the basis that International, Local, and individuals had no relation of employer and employee with the Pineapple and that there was no legal excuse for any defendant to attempt to boycott a cargo of pineapple, if such they did."

Thus this court held that the facts warranted the jury verdict on the basis of "secondary boycott" by the defendant union in violation Section 303.

Also in the case of the *United Brick & Clay Workers v. Deena Artwear, Inc.,* 198 F.(2d) 637, 22 L.C. 67,092, the United States Court of Appeals, Sixth Circuit affirmed a substantial jury verdict on secondary boycott as a violation of Section 303 A-1 of the Act. The court said:

> "If the picketing around the area of construction in the present case was by the Appellants and was for the purpose of forcing the general contractors to cease doing business with Deena, and accomplished that result, it was unlawful under Section 303(A)(1) of the Act. * * * In our opinion, the evidence was sufficient to take the case to the jury on the issue of whether the picketing on the part of the Appellants was against Deena or against the general contractors and purposes thereof."

Clearly, in the present case, the facts as presented to the trial court sustain a violation of Section 303 A-1 of the Act by each and all of the defendant union's parties hereto. The defendants were at fault in maintaining a picket line continuously from November 5th until the job construction was completed in the vicinity of both plaintiff's job sites and in the vicinity of at least one of plantiff's subcontractor's places of business, in threatening employees of plaintiff's subcontractor, in making statements that they were out to destroy plaintiff's business and also in inducing and encouraging employees of other employers to refuse to do work or to perform services for the plaintiff.

ARGUMENT AND ANSWER TO APPELLANTS' ARGUMENT
SUMMARY

The substance of appellant's argument, as we understand it, is based upon the vageness and indefiniteness of the lower court's findings and conclusions, which, however, were not included in the transcript of record. (1) The findings of fact entered by the trial court are supported by a preponderance of the evidence; (2) The conclusions of law as entered by the trial court are supported by findings of fact and by substantial evidence; (3) The judgment is supported by the evidence or the findings of fact.

I.

THE FINDINGS OF THE TRIAL COURT ARE DEFINITE, CLEAR AND SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE

As pointed out by the appellants in their brief, the burden of specifying in what respect the finding of the trial court are clearly erroneous is upon the appellants. The trial court did carefully detail its findings of fact, spelling out all necessary elements of secondary boycott under the Act (Appellants' Brief, 83 through 89). First, Paragraph I of the findings as well as the pre-trial order (R. 11) set forth that appellee is and was engaged in business affecting commerce. Second, Paragraph VI of the findings specifically spelled out inducement and encouragement by the defendants of the subcontractor's employees in the following language, "Contacted plaintiff's subcontractors and their employees, instructing

them not to load trucks or otherwise render any services for or on behalf of the plaintiff and uttering or implying threats of reprisals to employees if they should do so * * * " Third, in the same paragraph the court particularized illegal acts on defendants' part upon at least three occasions, detailing instances of threats to employees by the defendant unions at Cadman, Layrite Company, and Western Sand & Gravel (Appellants' Brief, 86).

A. THE TRIAL COURT'S FINDINGS COMPLY WITH RULE 52 OF THE FEDERAL RULES OF CIVIL PROCEDURE AS THEY ARE EXPLICIT FINDINGS OF FACT ON THE MATERIAL ISSUES.

Appellant assumes that the trial court's Findings of Fact are so incomplete that it will be necessary for this court to revue the entire record in order to determine what the "evidentiary facts" are. It will be noted that no such request to supplement the findings was made under Federal Rules of Civil Procedure, Rule 52(b). However, the rule requires the trial court to find ultimate facts, which in turn must be based upon "evidentiary facts" in the record. Findings of Fact cannot be burdened by the pleading of "evidencial facts." This rule is so well settled that it would serve no purpose to encumber this brief with citations of authority other than a general statement of the rule:

> "FINDING ULTIMATE OR PROBATIVE FACTS: It is well settled that Findings of Fact to be made by the trial courts in cases tried without a jury should be findings of the ultimate facts upon

> which the law must determine the rights of the parties, *rather than evidentiary facts.* Such findings should not be put in the form of the resume of the evidence, for this merely leads to confusion." (53 Am. Jur., pp. 795, Sec. 1142).

B. THE TRIAL COURT FINDINGS ARE NOT VAGUE AND INDEFINITE.

Finding of Fact II. The criticism of Finding of Fact II is without merit. It is admitted by the appellants in the pretrial order that appellant Carpenter's Union Local 131 and appellant Carpenter's Union Local 1289 are members of the Seattle District Council of Carpenters affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (R. 11). Also in the formal title of the case the Carpenters Union Local 131 and Carpenters Union Local 1289 are specifically identified as parties defendant. Furthermore, in the Conclusions of Law paragraph VI, it is specifically found:

> "That the plaintiff has been injured in its business and property by reason of the violations of Section 303-A by the defendants and each of them." (Appellants' Brief 89).

The judgment itself specifically refers to the defendants Local 131 and Local 1289 (R. 63).

Finding of Fact VI is adequate.

Finding of Fact VI alleges specific facts relative to the violation of Section 303-A (1) of the Labor-Management Relation Act of 1947, by each and every one of the defendants. Ultimate facts are set out in

detail with respect to the conduct of the defendant unions in the plants of three of the subcontractors as hereinabove set forth. These ultimate facts are adequately supported by evidenciary facts which have been minutely detailed by the appellant and appellee in the Statement of Facts contained in their briefs (Appellants Statement of the Case 3-37).

It is further contended by the appellants that the trial court adopted the Findings of the National Labor Relations Board which, it is inferred, were not supported by the evidence in the case at bar. It will be noted that the trial court in its Finding of Fact VI specifically pointed out that:

> "The conduct of the defendants by their agents directed at plaintiff's subcontractors and their employees is set forth in detail in the reported National Labor Relations Board Decision (*Seattle District Council of Carpenters, et al, and Cisco Construction Co.,* 114 NLRB 27, Case No. 19 CC 72)." (Appellants' Brief 85).

It is further apparent that this reference and adoption in the trial examiner's finding is superfluous. Without such incorporation by reference there are adequate ultimate facts upon the issue of liability.

The case of *United Brick & Clay Workers v. Deena Artwear, Inc.,* 198 F.2d 637 (Sixth Circuit 1952), is not authority for appellant's contention that the trial court could not adopt the finding of fact made by the National Labor Relations Board in the Seattle District Council of Carpenters, supra. The evidence produced before the District Court was found by the Circuit Court

to sustain plaintiff's burden of proof in establishing a cause of action against the United Brick & Clay Workers under Section 303A-1 of Labor-Management Relation Act of 1947, as amended. Furthermore, the Circuit Court did not agree with the NLRB's interpretation of facts and law.

It is therefore apparent that the trial court made independent findings of fact on the evidence in the record before it and that it was not improper to incorporate, in addition to his own language, that used by the trial examiner and adopted by the National Labor Relations Board when such findings were based upon the same evidence and same witness. Furthermore, Mr. Bassett, one of the counsel for the appellants, submitted these findings to the trial court stating: "These findings were correct," and that he was "ready to be judged by what the board said" (R. 34).

3, 4, 5 AND 6 FINDINGS OF FACT VII, VIII, IX AND X ARE SUFFICIENT

The sufficiency of these findings of fact are self evident and a repititive summarization of the evidence at this time would serve no useful purpose.

SUMMARY

It is submitted for the foregoing reasons that the Findings of Fact entered by the court below are sufficient under Rule 52 of the Federal Rules of Civil Procedure. In fact, they could not have been more explicit on the material issues, and more clearly substantiated by the evidentiary facts which were presented

before the trial court. We submit, therefore, that there was no error committed by the trial court in making and entering its Findings of Fact.

II.

THE TRIAL COURT COMMITTED NO ERROR IN THE ADMISSION OF EVIDENCE OR IN REFUSING TO STRIKE CERTAIN ADMITTED EVIDENCE

The trial court did not commit error in the admission of evidence and in refusing to strike certain admitted evidence. It is submitted that if the evidence complained of by the appellant had been improperly admitted, that it could be disregarded and there would be adequate substantial evidence in the record to sustain the judgment. It is elementary that erroneously admitted evidence will not, in itself, constitute grounds for reversal of a trial court by an appellant court in the absence of a showing that without such evidence the Findings of Fact could not be substantiated:

> "In holding that the admission was not prejudicial error, the courts have conditioned their decisions upon various facts such as that the evidence was meaningless or of trivial importance * * * ; That the result would have been the same had it been excluded, or, at least, that it is not shown to have affected the result improperly; * * * that it was cumulative and related to a fact otherwise proved by competent evidence * * *" (3 Am Jur. 580, Sec. 1028).

(Again it is unnecessary to burden this brief with additional citation of authority of this universal rule.)

A. EVIDENCE OF THE ACTIVITIES OF A REPRESENTATIVE OF TEAMSTERS UNION, LOCAL NO. 910 WAS RELEVANT AND THE COURT DID NOT ERR IN REFUSING TO STRIKE SUCH EVIDENCE.

Appellants object to the testimony of Pauchek concerning a conversation with a business agent of Teamsters' Local No. 910 of Kent. Similar testimony, however, was admitted by appellants by stipulation (R. 298).

Mr. Smith testified that he was first contacted by Mr. Al Crowder of the appellants' Local Union No. 174, in Seattle, advising him not to do business with Cisco (R. 301). He then testified that after he had leased trucks to the Cisco Construction Co., he was contacted by a Mr. Washum from the Teamsters Union in Kent, Washington, to again cease doing business with Cisco. This evidence was not objected to (R. 301). Testimony once admitted by the trial court and not objected to by opposing counsel, cannot be objected to for the first time upon appeal. This testimony further bears upon defendant's conspiracy as it tends to identify Mr. Washum and his activities with those of Al Crowder, the business agent of Local 174.

B. EVIDENCE OF THE ACTIVITIES OF UNION REPRESENTATIVES ON THE PREMISES OF ACME IRON WORKS & SOULE STEEL WAS PROPER.

The evidence of the activities of union representatives on the premises of the Acme Iron Works & Soule Steel

Co. was relevant and should not have been stricken. Mr. Del L. Peeler testified that in September of 1954, he had occasion to talk to a representative of the Teamsters Union. No objection was made to this testimony. The testimony was material as the witness related that the union representatives advised that Cisco Construction Co. was non-union; that Cisco was being picketed and that it would help the union's cause if the Acme Iron Works would refuse to load the Cisco trucks (R. 256-257).

Similarly, Mr. Vern M. Anderson of Soule Steel testified that he was approached by a stranger who introduced himself and stated who he was, advised Mr. Anderson that there was a picket line on the Cisco contract jobs and asked Mr. Anderson what would happen if there was a picket line around the Soule Steel plant (R. 263). The testimony of both Mr. Peeler and Mr. Anderson was received without objection. It was material and, therefore, it was proper for the trial court to consider the same. We again repeat that improper testimony admitted without objection cannot be objected to for the first time on appeal. *Smails v. O'Malley* (C.C.A. Neb. 1942), 127 F.(2d) 410; *Hickey v. U. S.* (C.A. Pa., 1953), 208 F.(2d) 269, 74 S. Ct. 519.

It is further interesting to note that no reference in the Findings of Fact was made to either the Acme Iron Works or Soule Steel. The only three concerns handling subcontracts who were directly mentioned, are Cadman Sand & Gravel Co., Layrite Co. and Western Sand & Gravel Co. Therefore, assuming for the sake of argument that the testimony of Mr. Peeler and

Mr. Anderson was erroneously admitted, it is only cumulative evidence, it is apparent that it was not considered by the trial court in determining the principal issues in the case, and is, therefore, not reversible error.

C. PLAINTIFF'S EXHIBIT 38, 40 AND 41 WERE PROPERLY AUTHENTICATED AND WERE PROPERLY CONSIDERED BY THE COURT.

The plaintiff's Exhibits 38, 40 and 41 were evidence preesnted to prove the additional costs incurred by the plaintiff in the completion of the Youngs Lake and Redman construction jobs. They were not offered to prove loss of profit, but actual costs over and beyond the agreed subcontract price. Plaintiff's Exhibit 38 consisted of the financial records of the two contracts with which we are here concerned, kept by the plaintiff from the period of November 20, 1954, to January 31, 1955. The accounting was based upon finances taken from the books customarily kept by the Cisco Construction Company in the course of business prior to their insolvency. Their business records consisted of cash receipts, cash disbursements, journals and ledgers. These books in their entirety were at the time of trial on counsel's table, and available to the appellants and their accountant (R. 313). It was further established during the trial of the case that all of the records of Cisco were made available to the defendants for at least one month prior to the trial of this case, as they were kept in the office vault of the United States Fidelity & Guarantee Company in the basement of the Central Building in

Seattle (R. 177). There is evidence to the effect that these books were actually used by the defendants before the trial (R. 178).

Plaintiff's Exhibit 40 is a record kept by the United States Fidelity & Guarantee Company of all disbursements and receipts made by them from the period of January 31, 1955, to appellants' job completions in December of 1955. This record included other jobs performed by the plaintiff as well as the Redman and Youngs Lake jobs. This record was kept by Mr. A. O. Prince, a permanent employee of the United States Fidelity & Guarantee Company, and the superintendent of Claims in the Seattle office. This record became a part of the permanent office records kept in Seattle by the United States Fidelity & Guarantee Company. In the Seattle office with this was kept all the supporting evidence as to how the funds were disbursed (R. 175). Mr. Prince testified that he countersigned all U. S. F. & G. checks paid out for plaintiff's obligations; and that he periodically made an examination of the Cisco bills and invoices in their field offices (R. 175). Mr. Prince was in charge of collecting all necessary supporting data to substantiate the obligations of plaintiff regarding the contracts. It was incumbent upon Mr. Prince to keep a permanent accounting and complete records on these jobs. These records kept by U. S. F. & G., a giant in the indemnity field, can safely be said to accurately reflect plaintiff's job costs.

Appellants rely upon Federal Shop Book Law 28 U.S.C., Sec. 1732 (Appellants' Brief, 56-57). Appellee

agrees this rule is applicable. But this statute permits the liberal receiption of business records as evidence when kept as a permanent record of a transaction in the regular course of business. These qualifications have been here met. Plaintiff's Exhibits 38 and 40 are properly in evidence.

The argument made by appellants however were properly addressed to the trial court, but without avail.

> "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to effect its weight, but such circumstances shall not effect its admissibility." 28 U.S.C., Sec. 1732.

For the reasons herein set forth the appellees urge that it was not error for the trial court to admit the Exhibits 38, 40 and 41.

III.

JUDGMENT SUPPORTED BY THE EVIDENCE

The burden of Appellants' argument upon this point seems to be that because the subcontractors were not actually shut down by Appellants' activities; because they were still able to make partial performance under their contracts although they could not make deliveries at the job site and could not do the technical installations contracted for; and although Appellee had to perform these extra services at substantially increased cost, and even though "there were incidents which created liability for the Appellants, there is no showing whatever that Appellee sustained any measurable damage as a result of those incidents" (Brief, 60).

Sec. 303 (b) provides:

> "Whoever shall be injured in his business or property by reason of any violation of Sub-section (a) may sue therefor in any District Court of the United States subject to the limitations and provisions of Sec. 301 * * * and shall recover the damages by him sustained and the cost of the suit."

A further review of the facts would seem entirely superfluous. As related in the opening portions of this brief, the record unequivocally demonstrates that Appellants' representatives, after establishing the picket line in question, contacted Appellee's subcontractors and their employees, and did "induce or encourage the employees" of said contractors to engage in a concerted refusal to perform services on behalf of their employers in connection with the Cisco subcontracts; that as a result, every one of Appellee's subcontractors (with the exception of Schultz Electric) defaulted in the performance of his contract; that the subcontracts covered approximately 75% of all of the work and practically all of the technical work, and that the Appellee was required at substantial additional expense to perform the subcontracted work.

Witness Schiel summarized the situation when he stated:

> "The picketing produced a most serious and difficult financial problem. Failure of all our subcontractors to perform required us to assume and take over the performance of their work, as we had had a prime contract with the government and a time schedule to meet with penalty clauses in the contract if we failed to complete the job on time. So we had to perform and take over the additional

> overhead expenses and procurement of labor, material and equipment as well as supervise the installation and performance of their entire subcontracts." (R. 115).

The Appellee's financial records and those of the United States Fidelity & Guaranty Co., which completed performance of the contract, and the testimony of the Certified Public Accountant employed by the Appellee show beyond possible question that the additional expense incurred by Appellee as a result of these contract defaults was as found by the court, "substantial."

In the face of such a record, it seems a bit absurd for Appellants to assert "In the instant case there is no showing of actual damages" (Brief 76).

Particularly significant is the careful, thorough and detailed consideration given this matter by the trial judge. On August 2d, 1956, he delivered an "oral decision" (R. 29-31) in which he stated:

> "However, it seems to me that the defendants or some of them engaged in activities thereafter which are proscribed by the Taft-Hartley Act. Therefore I want the plaintiff to give me a memorandum pointing out what direct evidence there is in the record of actions by the defendants amounting to encouragement, inducement, procurement, by concerted action, that looked toward termination of the subcontracts, and then point out what plaintiff suggests are the reasonable inferences that might be drawn from the direct evidence, and lastly in the memorandum I wish plaintiff to suggest what the evidence warrants in the way of a damage award for the first item of damage only; namely, what does the evidence show the damage was with re-

> spect to increased cost of performance flowing from and caused by termination for the subcontracts." (R. 31).

Pursuant to that request, plaintiff did file with the court a "factual memorandum" (R. 32-55). Several months later, after "full and extended consideration," the court entered its "Memorandum Decision" (R. 56-59). This decision states in part:

> "If defendants' representatives had confined themselves to picketing as originally conducted at the job site and to the trailing of Cisco trucks, there would be no basis under 29 USC 187 for liability in any respect or in any amount. However, under the evidence it is *indisputable* that each and all of the defendants engaged in activities amounting to secondary boycott prohibited by the Taft-Hartley Act as interpreted by the courts * * * ." (Emphasis supplied) (R. 56).

It further recites that these proscribed activities were

> " * * * conducted at least in part to force these secondary employers to cease doing business with Cisco by inducing and encouraging their employees to engage in a strike or concerted refusal to work in violation of Sec. 8 (b) 4 (A) of the Act." (R. 57).
>
> " 'After full and extended consideration, the Court has concluded and finds that the unlawful and concerted activities of defendants contributed directly, substantially and proximately to the non-performance of plaintiff's subcontracts.'
>
> " * * * While the precise amount of such damage cannot be fixed with mathematical certainty, a preponderance of the evidence *conclusively* shows that such damage in fact occurred and that it was substantial in amount." (Emphasis supplied) (R. 58).

and finally:

> "The subcontracts specified a total cost of approximately $600,000.00 to plaintiff for services and materials for the Redmond and Youngs Lake jobs. When plaintiff was required to provide in whole or in part the services and materials defaulted under the subcontracts, it was put at an expense therefor of at least $75,000.00 above the subcontract cost. The Court finds plaintiff's damage in the amount just stated by reason of the unlawful and concerted activities of defendants resulting in non-performance of the subcontracts." (R. 58).

The Findings of Fact were not included by the Appellants in the Transcript of Record, but are set forth in Appendix B to their brief. These Findings of Fact entered by the trial court in Finding No. VI detail the specific "proscribed activities" engaged in by Appellants; in Finding No. VII that said conduct was carried on at least in part to force plaintiff's subcontractors as secondary employers to cease doing business with Appellee; in Finding No. VIII that the activity was engaged in by the defendants jointly as concerted action; in Finding No. IX that these concerted proscribed activities contributed substantially, directly and proximately to the non-performance of plaintiff's subcontracts by the subcontractors; and in Finding No. X "That as a result of the concerted activities of the defendants and the intended consequent failure of plaintiff's subcontractors to perform their subcontracts, plaintiff was required to and did perform the work contemplated by said subcontracts; that in performing said work, plaintiff was required to provide in whole or in part the services and materials defaulted under the subcontracts, and was put to an

expense therefor of at least $75,000.00 above the subcontract cost; that plaintiff has thereby suffered damage in the sum of at least $75,000.00." (App. Br. 87).*

The trial court's Conclusions of Law, and particularly Conclusions No. V, VI and VII, establish Appellants' liability on the basis of the facts found and under the law applicable thereto.

MEASURE OF DAMAGES

The Supreme Court of the State of Washington has consistently followed the general rule concerning the assessment of damages.

> The measure of damages in tort actions is that indemnity which will afford an adequate compensation to a person for the loss suffered or the injury sustained.
>
> Dyal v. Fire Co.'s Adj. Bur., 23 Wn.2d 515.
> Burr v. Clark, 30 Wn.2d 149.

MANY DECISIONS IN RECENT LABOR CASES BROUGHT UNDER SEC. 303 APPROVE ALLOWANCE OF DAMAGES SIMILAR TO THOSE SET FORTH IN THE COMPLAINT HEREIN.

In *United Construction Workers v. New Brunswick Veneer,* 274 SW (2) 787 (KY.), the employer was awarded $75,000.00 damages because of illegal union conduct which necessitated his closing down a plant valued at $250,000.00.

In *Wartex Mill v. Textile Workers,* 109 Atl. (2) 815

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*For detailed analysis of Appellee's additional expenses see accountant's summaries (R. 47, 48, 51-55).

(Pa.), an employer collected $66,254.00 damages, including $10,166.37 payroll expense, $41,723.07 lost profits and $14,364.90 cancelled sales.

In *Garmon v. San Diego Building Council,* 273 P.2d 686 (Calif.), employer recovered for loss of profits.

In the Federal jurisdictions, similar rules apply.

In a recent Circuit Court of Appeals case, there is a close parallel to the circumstances and to the claims of the parties. *United Mine Workers v. Patton,* 211 F.2d 742. In that decision the chief judge, speaking for the court, says (page 745):

> "On the question of damages, the evidence is that plaintiff purchased the equipment of Moore for $25,000.00, paying only $10,000.00 in cash and the remainder on a tonnage basis as the mining operation went forward. From March 1949 to March 1950 they returned a net income as the result of the operation of approximately $47,000.00 and contend that the actual profits were in excess of $60,000.00. They introduced a witness who estimated the profits for the remaining months of the three year lease at $125,274.92 based on the old operating costs and the current price of coal and at $232,289.62 based upon reduced cost of operation considered possible.
>
> "On these facts we think that the case was one for the jury under 303(b) * * * ."

(The verdict and judgment appealed from was in the sum of $150,000.00 damages.)

Although the Circuit Court reversed the case on other grounds, the foregoing language clearly establishes the basis for recovery in a case similar to the one now before the court.

See also *International Longshoremen v. Juneau Spruce Corporation,* 189 F.2d 177, and the decision on appeal in 342 U.S. 327, 72 S Ct 235.

From these authorities, it appears that the measure of damages allowable under the provisions of Sec. 303(b) includes loss of profits, destruction of business, as well as additional expense. If error was committed by the trial court in the instant case, it was in limiting Appellee's damages to the additional cost incurred in completing its contracts resulting from Appellants' illegal actions.

Not only did the trial judge limit Appellee's damages to the item of additional cost, but he allowed only the minimum amount of such damage. After remarking in his Memorandum Decision that "while the precise amount of such damage cannot be fixed with mathematical certainty * * * a preponderance of the evidence conclusively shows that such damage in fact occurred * * * " and that it was in an amount of *"at least* $75,000.00" (R. 58). (Emphasis supplied).

The court's decision and his finding of fact upon the measure of damages is as specific as is required by Rule 52(a). It certainly is as specific as can be expected in a damage action, whether it be personal injury or property damage, and where the evidence supporting the claim to damage is necessarily subjective or consists of matters of opinion and interpretation.

Appellants seemingly do not question the reasonableness of the amount of the award of damages. They pray for "more specific and forthright findings" upon

the issues, presumably including that of damages. Were this a personal injury action, they might with equal propriety insist that the court should make a finding as to the compensation to be allowed for each limb or organ involved in the injury. This, of course, is a favorite strategy for injecting error into a record.

CONCLUSION

If the facts of this case were in accordance with Appellants' wishful thinking and their subjective interpretation set forth in detail in their brief, this cause would not be before this court.

At the time the cause was submitted to the trial judge on August 2, 1956, he indicated in an oral opinion that it appeared that the defendants had engaged in "proscribed activities" which had caused the Appellee's damages. He requested briefs from the parties, which were submitted. "After full and extended consideration" the court handed down its memorandum decision on December 28, 1956, wherein the trial court found that

> "*Under the evidence it is indisputable* that each and all of the defendants engaged in activities found in a secondary boycott, prohibited by the Taft-Hartley Act * * * ." (Emphasis supplied).
>
> "That the unlawful and concerted activities of the defendants contributed directly and substantially and proximately to the non-performance of plaintiff's subcontracts"

and that the Appellee's additional costs, by reason of the non-performance of the subcontracts, was "at least $75,000.00", the amount of the damages awarded.

The record amply supports the judge's "memorandum decision" and findings. The findings adequately support the judgment. The judgment should be affirmed.

Respectfully submitted,

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